NO. 15-60063

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DIXIE ELECTRIC MEMBERSHIP CORPORATION
PETITIONER-APPELLANT

V.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT-APPELLEE

ON PETITION FOR REVIEW, AND CROSS-APPLICATION FOR ENFORCEMENT, OF DECISION AND ORDER BY THE NATIONAL LABOR RELATIONS BOARD
CASE NOS. 15-CA-19954 AND 15-UC-61496

ORIGINAL BRIEF OF PETITIONER- CROSS RESPONDENT DIXIE ELECTRIC MEMBERSHIP CORPORATION

David J. Shelby, II, Bar #22614
M. Lenore Feeney, Bar #18597
TAYLOR, PORTER, BROOKS & PHILLIPS L.L.P.
Chase Tower South
451 Florida Street, 8th Floor (70801)
Post Office Box 2471
Baton Rouge, LA 70821-2471
Telephone: (225) 387-3221
Facsimile: (225) 346-8049

Attorneys for Dixie Electric Membership Corporation

NO. 15-60063

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT
DIXIE ELECTRIC MEMBERSHIP CORPORATION
PETITIONER-APPELLANT
V.
NATIONAL LABOR RELATIONS BOARD
RESPONDENT-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Linda Dreeban, counsel for the Respondent-Appellee-Cross Petitioner in this appeal, the National Labor Relations Board.
2. The National Labor Relations Board, the Respondent-Appellee-Cross Petitioner in this appeal.
3. International Brotherhood of Electrical Workers, Local Union 767, party in underlying NLRB cases.
4. Nora Leyland, counsel for International Brotherhood of Electrical Workers.
5. Lucas R. Aubrey, counsel for International Brotherhood of Electrical

Workers.

6. Successor to Floyd Pourciau, Business Manager for International Brotherhood of Electrical Workers.

7. Edward Hill, International President for International Brotherhood of Electrical Workers.

8. Sandra Hightower, Regional Director for Region 15 of the National Labor Relations Board.

9. Beauford D. Pines, counsel for the Acting General Counsel Region 15 of the National Labor Relations Board.

10. Kathryn M. McKinney, Regional Director, NLRB Region 15.

11. Julie Broch Broido, counsel for NLRB Region 15.

12. Michael Randall Hickson, counsel for NLRB Region 15.

13. Dixie Electric Membership Corporation, the Petitioner-Appellant-Cross Respondent in this appeal.

14. David J. Shelby, II, counsel for Dixie Electric Membership Corporation, Petitioner-Appellant-Cross Respondent in this appeal.

15. M. Lenore Feeney, counsel for Dixie Electric Membership Corporation, Petitioner-Appellant-Cross Respondent in this appeal.

/s/ David J. Shelby, II
Attorney of Record for the Petitioner-Appellant-Cross Respondent, Dixie Electric Membership Corporation

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would significantly aid the decisional process for the following reasons: This case involves the issue of whether individuals employed as Systems Operators qualify as statutory supervisors pursuant to the National Labor Relations Act based on their specific job duties, management authority, and responsibilities. Oral argument would assist the application of detailed facts to the legal analysis of supervisory status. Oral argument would assist in distinguishing this case factually and procedurally from other ongoing appeals dealing with this same issue — specifically, *Entergy Mississippi, Inc. v. NLRB*, case no. 14-60796.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

STATEMENT REGARDING JURISDICTION

Pursuant to 29 U.S.C. §§ 160(e) and (f), this Court has jurisdiction over petition for review—and cross-application for enforcement—of a final decision and order of the National Labor Relations Board dated November 19, 2014. Dixie Electric Membership Corporation (hereafter "DEMCO") timely filed a petition for review on January 26, 2015. The National Labor Review Board (hereafter "NLRB" or "Board") subsequently filed a cross-application for enforcement on February 10, 2015.

STATEMENT OF THE ISSUES

a. Whether the Chief Systems Operator and Systems Operators (collectively referred to as "Systems Operators") are "supervisors" under the National Labor Relations Act (hereafter "NLRA" or "the Act") based on the facts in the record, authoritative jurisprudence from this court, and persuasive jurisprudence of other circuit courts.

b. Whether the International Brotherhood of Electrical Workers (hereafter "IBEW" or "Union") expressly waived its right to bargain over the change in classification in the Management Rights Article of the Collective Bargaining Agreement which explicitly gave DEMCO the right to discontinue job classifications, or, alternatively, waived its rights to bargain through its own failure to request bargaining after prior notice of the change.

c. Whether DEMCO's Unit Clarification Petition, which is a proper procedural vehicle to determine whether the Systems Operators are supervisory positions, was improperly ignored by the NLRB.

I. STATEMENT OF THE CASE

A. Factual Background

DEMCO provides electricity to customers in southern Louisiana. International Brotherhood of Electrical Workers, Local Union 767 (hereafter referred to as "Union" or "IBEW") was certified as the collective bargaining representative of DEMCO's classified employees in 1974.

In November 2010, DEMCO announced a plan to change its management structure effective December 1, 2010. The non-management positions of Systems Operator and Chief Systems Operator (hereafter referred to collectively as "Systems Operators") were changed to management positions, and the job duties and responsibilities of the prior positions were expanded. Existing employees were promoted into these new management positions. This change occurred after both verbal and written notice was provided to the affected employees and to the Union in November of 2010. (General Counsel Exhibit 7). After notice, the Union made no request to bargain over this change. Over ten weeks later, on March 7, 2011, the Union filed an unfair labor practice charge against DEMCO. The basis of the Union's charge was, "Effective December 1, 2010, the above named employer has excluded the system operators from the bargaining unit."

Under the Collective Bargaining Agreement (hereafter "CBA") and the National Labor Relations Act (hereafter the "Act" or "NLRA"), DEMCO was not

required to bargain with the Union over the removal and reclassification of those positions as management positions with expanded responsibilities. The employees who worked in those positions were, in fact, supervisory employees both before their removal from the bargaining unit and after their formal change to management on December 1, 2010 when these positions were given additional supervisory authority and responsibilities. Section 14(a) of the NLRA provides that no employer may be compelled to bargain over supervisors.

Pursuant to the Management Rights Article of the CBA in existence at the time of the change, the Union expressly waived its right to bargain. Additionally, the record shows that after being provided reasonable advance notice of DEMCO's intentions, the Union failed to timely request bargaining over DEMCO's removal of these job classifications from the bargaining unit. Further, the Union failed to submit a grievance as contemplated by the CBA in effect at the time of the notice. In fact, the Union failed to act with due diligence and waited to submit an Unfair Labor Practices Complaint ("UL Complaint") until approximately ten weeks later, after the CBA in place at the time of the change had expired and a new CBA had been negotiated.

Irrespective of the change to management in December of 2010, after the expiration of the CBA in February of 2011, DEMCO had the right to not recognize the Union as the representative of statutory supervisors when bargaining for a new

CBA. As the record shows, DEMCO utilized the proper procedural vehicle to resolve this issue for the purposes of the new CBA adopted in February of 2011 when DEMCO filed its Unit Clarification Petition (hereafter "UC Petition"). Rather than ruling on DEMCO's UC Petition, which was timely filed as to the exclusion of the Systems Operators from the bargaining unit in the new CBA the Board improperly and arbitrarily concluded that DEMCO's UC Petition was untimely. Under the new CBA, Systems Operators are not and should not be included in the bargaining unit.

B. Procedural History

When the previous CBA expired in February of 2011, DEMCO and the Union negotiated a new CBA effective February 28, 2011 through February 28, 2015. During those negotiations rather than requesting bargaining over this issue, the Union simply reserved its objection to the December 1, 2010 removal of the Systems Operator positions from the bargaining unit. Those classifications remained out of the bargaining unit in the new CBA. The Union filed its Unfair Labor Practices Complaint on March 7, 2011, after the new CBA was in place and the previous CBA had expired. The basis of the Union's charge was "[e]ffective December 1, 2010, [DEMCO] excluded the system operators from the bargaining unit." DEMCO responded by filing a UC Petition concurrently with its answer to the UL Complaint. A clerk for the NLRB arbitrarily decided to not consider

DEMCO's UC Petition because it was filed within DEMCO's answer (although properly described as a UC Petition) and not separately filed as a UC Petition, despite the fact that this method of filing a UC Petition is not prohibited by the NLRA rules. DEMCO resubmitted its UC Petition to the NLRB on July 21, 2011 to resolve the issue of whether Systems Operators were supervisory positions and could be excluded from the bargaining unit for the purposes of the new CBA.

The issues of DEMCO's removal of the Systems Operator classifications from the bargaining unit, DEMCO's alleged obligation to bargain over said removal, and the timeliness of DEMCO's UC Petition were brought before an Administrative Law Judge on October 17-18, 2011. After hearing, the Administrative Law Judge issued and signed a Decision on January 24, 2012 which held that DEMCO unlawfully modified the bargaining unit and violated its duty to bargain over the removal. The Administrative Law Judge refused to rule on the UC Petition and arbitrarily deemed it untimely.

DEMCO thereafter timely filed Exceptions to the Administrative Law Judge's Decision with the NLRB. On August 31, 2012, the NLRB upheld the Administrative Law Judge's Decision and ordered DEMCO to return the Systems Operator positions to the bargaining unit. DEMCO timely filed a petition for review with this Court on October 10, 2012. The NLRB subsequently filed a cross-application for enforcement on November 5, 2012. Also at issue in that

appeal was whether the NLRB had the requisite quorum of members at material times during the Agency proceedings. DEMCO argued that the NLRB lacked a quorum because certain members of the Board were invalidly appointed by President Obama pursuant to the Recess Appointments Clause of the U.S. Constitution.

After the parties filed briefs with the Fifth Circuit, the Fifth Circuit granted DEMCO's unopposed motion to stay the case, because the Constitutional quorum issue outlined in the appeal also was pending before the U.S. Supreme Court in *National Labor Relations Board v. Noel Canning* (No. 12-1281). [1] The U.S. Supreme Court in *Noel Canning*, 134 S.Ct. 2550 (2014) held that certain members of the NLRB were improperly appointed, and; therefore, the Board lacked a quorum at various times. As a result of the *Noel Canning* decision, this Court granted the NLRB's opposed motion to vacate and remanded this matter back to the Board for further proceedings on August 7, 2014.[2]

On November 19, 2014, the Board adopted the recommended Order of the administrative law judge (with modifications to include compensation of employees for adverse tax consequences, if any, and notification to Social Security Administration regarding allocation of back pay awards to the appropriate calendar

---

1 Doc. 00512417347, Case No. 12-60797, Order dated October 23, 2013

2 Doc. 00512726313,Case No. 12-60797, *Per Curiam* Order of Court dated August 7, 2014

quarters for each employee, and substitution of an attached notice for that of the administrative law judge) and again concluded that Systems Operators were not supervisors and, thus DEMCO committed an unfair labor practice by failing to bargain over the Systems Operators' terms and conditions of employment. DEMCO again timely filed a petition in this Court on January 26, 2015 for review of the Board's November 19, 2014 decision. Thereafter, the NLRB filed a cross-application for enforcement of the Board's November 19, 2014 decision.[3]

DEMCO asserts that the Systems Operators are supervisors pursuant to the NLRA, and; therefore, DEMCO cannot be compelled to bargain with the Union over the terms and conditions of their employment.

II. SUMMARY OF ARGUMENT

This Court should not and cannot enforce the Board's order for several reasons: (1) the Systems Operators are supervisory positions not covered by the NLRA; (2) DEMCO did not violate its duty to bargain because the Union, through the CBA Management Rights Article and its own inaction, waived any right to bargain and (3) the Board improperly ignored DEMCO's timely filed UC Petition.

The Board's decision that DEMCO unlawfully modified the bargaining unit ignores well-established jurisprudence. The Board disregarded this Court's precedent set forth in *Entergy Gulf States*, a factually analogous case that

[3] Doc. 00512937491, Case No. 15-60063.

established that similar positions were supervisory. *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001). Considering the authority and responsibility given to and the independent judgment required of Systems Operators, as set forth in the record below, in concert with the legal precedent of this Court, the NLRB's decision lacks legal and factual support.

Moreover, to the extent the Union has any bargaining rights, it waived those rights by its contractual agreement and its own inaction. A party is capable of waiving its bargaining rights by contractual agreement. *See, e.g., Metro. Edison Co. v. N.L.R.B.,* 460 U.S. 693, 707-08 (1983); *NL Indus., Inc. v. NLRB,* 536 F.2d 786, 788-89 (8th Cir.1976). Where the language of the contract is clear, the court should limit its inquiry the plain language of the agreement and not inquire into the intent of the parties. *Paper, Allied-Indus. Chem. & Energy Workers Int'l Union, Local 4-12 v. Exxon Mobil Corp.*, 657 F.3d 272, 279 (5th Cir. 2011). The Board failed to apply the well-settled principles of contract interpretation when it considered the Management Rights Article. Additionally, the Union waived its right to bargain when it failed to request bargaining after prior notice of the change. *NLRB v. Pinkston-Hollar Constr. Servs., Inc.,* 954 F.2d 306, 310 (5th Cir. 1992).

III. ARGUMENT

A. Standard of Review.

The statutory authority for judicial review of the NLRB's decision is at 29 USC §160(f), which provides that an aggrieved party can seek review of the Board's final order. The burden of proving that an employee is a supervisor rests with the party asserting such a status. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001). While the NLRB's findings are entitled to special weight, this Court has the ability to set aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. *Allentown Mack Sales & Serv. Inc. v. NLRB*, 522 U.S. 359 (1998).

B. DEMCO's Systems Operators are supervisors under the National Labor Relations Act and, as such, DEMCO had the right to remove those positions from the unit without an obligation to bargain.

DEMCO acted consistent with the authoritative law and the CBA in effect at the time it removed the supervisory positions from the bargaining unit. Systems Operators were changed to management positions—a classification change consistent with the current and expanded authority and responsibilities of the positions which occurred after DEMCO provided reasonable and adequate notice to the Union. John Vranic, CEO and General Manager of DEMCO, testified that

after supervising the Systems Operator positions, he determined that the position classifications were, in fact, supervisory positions, and, as such, should be removed from the bargaining unit and designated as management positions. (Hearing Transcript p. 185, line 15-25 and p. 186, lines 1-20). It was also determined that these positions should and would be given even greater supervisory authority and responsibilities to better manage the operations of the Company.

Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) excludes any individual employed as a "supervisor" from the definition of "employee" and, consequently, from coverage under the Act. The defining criterion for supervisory status is set forth under Section 2(11) of the Act. Under Section 2(11), supervisory status exists if an individual possesses:

> authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, **assign**, reward, or **discipline** other employees, or **responsibly to direct them or to adjust their grievances, or effectively to recommend such action**, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the **use of independent judgment**.

29 U.S.C. § 152(11) (2013) (emphasis added). This Court has held that a supervisor performs any one of the functions listed in section 2(11) in addition to possessing the authority to use independent judgment. *Monotech of Mississippi v. N.L.R.B.,* 876 F.2d 514, 517 (5th Cir. 1989); *N.L.R.B. v. KDFW-TV, Inc., a Div. of Times Mirror Corp.,* 790 F.2d 1273, 1277 (5th Cir. 1986).

This Court previously explained that, although the question of whether an employee is a supervisor is a question of fact and deference is given to the NLRB's decision, "if an agency's legal interpretation of a statute conflicts with its prior positions…the interpretation is entitled to considerably less deference." *Entergy Gulf States, Inc.*, 253 F.3d at 208. In fact, this Circuit emphasized that "although the NLRB can change its policies and must respond to new circumstances, a departure from past agency precedents requires at least a reasoned explanation of why this is done." *Id.*

It is well settled that Section 2(11) is to be read in the disjunctive, and that the presence of any one of the twelve listed criteria/activities establishes supervisory status. *KDFW-TV, Inc.*, 790 F.2d at 1277; *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571 (1994). Significantly, the Court held in *Health Care & Retirement Corporation of America*, "**[t]he Act is to be enforced according to its own terms…[w]hether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way round.**" *Id.* at 580 (emphasis added). Under Section 2(11), the controlling statute, "any individual who has the authority to use independent judgment in the execution or recommendation of any of the functions listed…is a supervisor." *Monotech of Miss.*, 876 F.2d at 514. Moreover, supervisory status requires only the existence of any one of the enumerated powers/authorities and

does not turn upon the frequency of its/their exercise. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949); *West Penn Power Co. v. NLRB*, 337 F.2d 993 (3d Cir. 1964). *Morello v. Fed. Barge Lines, Inc.*, 746 F.2d 1347 (8th Cir. 1984).

There is a long history of disagreement between the Board and the Courts of Appeal over the application of Section 2(11) to those individuals who monitor and maintain the transmission and distribution of power. These classifications at issue here (Systems Operators) are similar to many other titles including Operations Coordinators, Systems Dispatchers and Systems Supervisors, that were routinely found by the Courts to be "supervisors" under the "responsible direction" criterion. In fact, eight federal circuit appellate courts have concluded utility-industry dispatchers are supervisors under the NLRA.[4] Finally, in 1983, the Board agreed with the long judicial precedent and found that "system supervisors" were Section 2(11) supervisors because they responsibly directed field employees in the execution of complex switching orders. *Big Rivers, 266 NLRB No. 72* at 383 n.2. From 1983 until its decision in *Mississippi Power & Light Co.*, 328 NLRB No. 146 (1999), the Board followed its policy set forth in *Big Rivers* and excluded

[4] *See Entergy Gulf States,* 253 F.3d at 211; *West Penn Power Co. v. NLRB*, 337 F.2d 993 (3rd Cir. 1964); *Ariz. Pub. Serv. Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971); *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 243 (6th Cir. 1976); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980); *Southern Ind. Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 884 (7th Cir. 1981); *Monogahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981); *Pub. Serv. Co. of Col. V. NLRB*, 271 F.3d 1213 (10th Cir. 2001).

individuals in the system supervisor/dispatcher positions from utility company bargaining units as Section 2(11) supervisors.

The Board's decision in *Mississippi Power & Light* overturned well established precedent which had been followed by the Board for nearly two decades. Moreover, the *Mississippi Power & Light* decision was in direct conflict with fifty years of decisions by the federal courts of appeal.

When the Board applied its new *Mississippi Power and Light* rationale ruling against Entergy Gulf States and found that its operations coordinators were not "supervisors," the Fifth Circuit promptly reversed the Board in the controlling case law for the instant suit. *Entergy Gulf States,* 253 F.3d at 203. In *Entergy Gulf States*, this Court determined that nearly identical positions were supervisory in nature and, therefore, excluded from coverage under the NLRA. The Fifth Circuit noted that

> "the NLRB departed without a 'reasonable explanation' from the position it had espoused for nearly twenty years, and the position circuit courts enforced for many years before that, that electrical industry employees just like OCs are indeed supervisors. Mississippi Power & Light is unreasonably inconsistent with previous precedents under the NLRA."

After analyzing the facts of the case under Section 2(11) of the NLRA, the Fifth Circuit found that the operations coordinators were supervisors, because they used independent judgment to direct other workers responsibly. In so finding, the appellate court noted that the courts have rejected the Board's arguments that the

workers only "requested" cooperation from field workers who were employed under separate chains of command, and that the courts were not "dissuaded by evidence that the [Operations Coordinator]-like workers referred to written protocols, consulted with superiors in emergencies, and did not outwardly appear to be supervisors."

The Court found that the Board's policy change was not supported by the argument that modern "work force and workplace changes" make quasi-professionals and quasi-overseers more common. The Board could not rely on general labor trends to justify a status change while admitting that the particular job at issue had not materially changed. The Court stated, "It is the specific facts, not the Board's perception of labor trends, that must determine how the relevant law applies."

> Nor is there substantial evidence that [Operations Coordinator] supervisory responsibilities have significantly diminished in recent years. Technology and organizational developments have both added to and reduced [Operations Coordinator] responsibilities, but the material [Operations Coordinator] tasks have not changed. [Operations Coordinator's] still operate without supervision and direct field workers after-hours. They independently decide whether to open up an area office or how many workers initially to call to duty. They have discretion to prioritize repairs in a particular area and move field workers between jobs. Call shifts for field workers do not end until [Operations Coordinator] release them. [Operations Coordinator's] have considerable responsibility for safe switching orders and timely power restorations. The [Operations Coordinator's] 'effectively direct field operations during emergencies and after hours.' *Arizona Pub. Serv. Co.*, 453 F.2d at 232. It is simply incorrect to describe the

> [Operations Coordinator's] directions to field personnel as an 'almost routine or clerical dispatching function.'
>
> *Mississippi Power & Light Co.*, 1999 WL 551405 at *14.

Entergy Gulf States is controlling in this matter and requires a reversal of the Board's underlying order and finding that the systems operators are supervisors as defined by the NLRA. The Systems Operators in this case have virtually the same duties as the Operations Coordinators in *Entergy Gulf States*: (1) authority to discipline and coach employees; (2) authority to assign field employees to areas, shifts, and tasks; (3) authority to approve overtime; (4) ultimate responsibility for actions of subordinates; and (5) use of independent judgment to create switching orders, assign and direct field workers, and prioritize work.

Despite the well-reasoned reversal of the Board in *Entergy Gulf States*, the Board continues to improperly rule that central distribution dispatchers are not supervisors under Section 2(11) of the Act. *See Avista Corp*, 357 NLRB No. 41 (Aug. 9, 2011). In spite of the fact that the Fifth Circuit held that the Board had no reasoned basis to reverse its *Big Rivers* position on the workers in *Mississippi Power & Light,* and that the latter decision was inconsistent with still-governing circuit court law interpreting the NLRA, the *Avista* Court ruled that the Board has not overruled *Mississippi Power* or otherwise returned to the rule set forth in *Big Rivers Electric*.

Regardless of the Board's blatant disregard for the law, DEMCO's Systems Operators are supervisors under the standard created by the Board. Unlike the distribution dispatchers in *Avista*, the DEMCO Systems Operators and Chief Systems Operator have backgrounds with experience in DEMCO's field operations (Jeremy Blouin testified at hearing that he was a lineman for 7 ½ years before he became a Systems Operator (Hearing Transcript p. 339, line 2) and Ronald May, the Vice President of Engineering and Operations for DEMCO, testified that the other operators had prior field experience (Hearing Transcript p. 305, lines 1-5)); the operators do assign field employees to areas, shifts or crews; the chief systems operator does evaluate the performance of an employee; the operators are encouraged to report problems with field employees that results in corrective action; and the operators do create their own switching orders and are held responsible when these orders are not completed. (Hearing Transcript p. 355, lines 16-25). According to Blouin, the Operators often operate equipment that allows them to fix a problem without using a field employee. (Hearing Transcript, p. 341, line 23-25 and p. 342, lines 1-6). In fact, the operators at DEMCO have a true managerial role that includes training as such.

The uncontested testimony at the hearing fully supports DEMCO's position. May testified at the hearing that he has been the direct supervisor of the Systems Operators since approximately January of 2008. (Hearing Transcript p. 37, lines

23-24). Prior to that, John Vranic was the direct supervisor for the Systems Operators. (Hearing Transcript p.37, line 25 and p. 28, line 1-2). When Vranic was promoted to CEO and General Manager for DEMCO, the supervisory duty transferred to May. May testified that the Chief Systems Operator and Systems Operator positions have evolved into positions that are responsible for directing and operating the utilities systems 24 hours a day, 7 days a week. (Hearing Transcript p.66, line 18-19).

Rather than simply answering telephones, taking information regarding power outages and requesting that other employees restore power, these operators utilize technology that constantly monitors the power system and addresses the problems or potential problems in real time so that power can be restored or outages avoided. The operators have to prioritize work daily, because DEMCO's services cover over 100,000 members and there are squirrels, fallen tree limbs, bad weather and a number of other problems that can cause outages or interruptions of service all the time. (Hearing Transcript p. 229, lines 18-25; p.230, lines (1-15); p.341, lines 11-22).

Since December 1, 2010, operators use their independent judgment to direct DEMCO resources to restore power and to decide how many field personnel to call out to restore power, and the operators are held responsible for calling unnecessary field personnel. (Hearing Transcript p.94-96). They are subject to coaching or

discipline for utilizing unnecessary field personnel. (Hearing Transcript p.273, line 11). Furthermore, the operators do not have to seek May's approval to make these decisions. (Hearing Transcript p.227, lines 1-3). Unlike the dispatchers in *Avista*, May testified that the operators use their knowledge of the system to create switching procedures, and then they execute the procedures by directing the field personnel to perform the tasks. (Hearing Transcript p.53, lines 1-3). A switching procedure is a set of unique written instructions that is created by operators and then followed by field personnel under the close supervision of the operators to ensure the safe and complete process of switching lines. The end result of switching lines might be transferring of a load, de-energizing a line or restoring power in an abnormal situation. (Hearing Transcript p.53, lines 1-3). Operators create switching orders almost daily for construction projects or to transfer loads from one source to another source. These switching procedures are normally created without higher management review or input. Operators have been charged with creating these switching orders both before and after December 1, 2010; however, prior to December 1, 2010, the operators would generally seek May's approval of most of the orders they wrote. (Hearing Transcript p. 262, lines 3-9).

The law dictates that supervisors are accountable for the work product of the employees he directs. *Entergy Gulf States*, 253 F.3d at 209. In this case, DEMCO's Systems Operators are held responsible when the switching procedures

are not completed. (Hearing Transcript p. 256, line 20-25 and p.257, lines 1-15). May testified regarding a coaching session with a Systems Operator after a problem arose from an incomplete switching procedure. (Hearing Transcript p.273, line 11). After December 1, 2010, the operators do not routinely seek May's approval for the switching orders they create.

After December 1, 2010, written job descriptions were created for the operators that define the roles and responsibilities of the operators. Although many of the roles and responsibilities of the operators remained the same, after December 1, 2010, the operators were given authority to carry out these functions and duties without approval or concurrence from management, because now operators are management. After December 1, 2010, if the operators encounter difficulty with field personnel, they are required to report that information to May and to the District Supervisor who is the direct supervisor of the field personnel involved. (Hearing Transcript p.267, lines 15-22 and p.270, lines 3-19). This function is part of the process for determining whether to discipline a field employee or to determine what steps can be taken to make the work in the field run more smoothly. (Hearing Transcript p.268, lines 1-25). For example, Systems Operator, Levy Sibley, reported a problem in the field that resulted in a coaching session with the field employee. (Hearing Transcript p.269, lines 13-20). Chief Systems Operator, Bonalee Conlee, provided May with concerns over field

employees' work procedures, and the field employees were given a coaching session. (Hearing Transcript p.287, lines 15-21).

As previously discussed, the exercise of independent judgment is a determinant function of supervisor positions. This Court recognizes that the exercise of technical expertise or judgment qualifies as "independent judgment." *NLRB v. Kentucky River Cmty. Case, Inc.*, 532 U.S. 706 (2001); *see also Entergy Gulf States*, 253 F.3d at 211The underlying record is filled with examples of Systems Operators using their experience and independent judgment. May testified about an example of the operators' use of independent judgment regarding a storm that caused many simultaneous outages. (Hearing Transcript p.315, lines 6-18). The Systems Operator, Sibley, made the decision to reassign the Ascension Parish crews to the Livingston Parish area to work on restoring power quickly. (Exhibit R-8). Normally, these two crews are in two different areas with different field supervisors and territories; however, Sibley determined that this assignment would restore power more efficiently. (Exhibit R-8). This required overtime work from the field employees, and Sibley did not have to obtain higher authorization to direct this work. (Hearing Transcript p.89, lines 2-8).

May testified that since December 1, 2010, operators work more independently and don't obtain approval from management now that they are defined as management. (Hearing Transcript p.227, lines 1-3). May also testified

that operators call field personnel with skill sets that best fit the issue they are trying to resolve. (Hearing Transcript p.244, line 8-14). For example, individuals with a greater skill set in restoring underground power outages are chosen by the operators for those types of problems. Likewise, operators know which field employees to choose to operate an 18-wheeler, and they do not require approval from May or anyone else to make that choice. Systems Operator Jeremy Blouin testified that he is familiar with the field employees and he knows who is better at performing certain tasks than others. (Hearing Transcript p.371, lines 6-15). He factors that information into his decision about who to call for a particular duty. (Hearing Transcript p.371, lines 20-25). Blouin testified that the Operators also have authority to call contract crews for specialty work and non-DEMCO crews when dealing with weather conditions such as a tropical wave or ice storm. (Hearing Transcript p.347, lines 3-10). Although May is Blouin's supervisor, Blouin does not call May for permission to work somebody on overtime. (Hearing Transcript p.347, lines 18-24). May testified that operators dispatch crews to outages and then reassign other personnel as needed without obtaining May's concurrence. (Hearing Transcript p.228, lines 13-21).

Before and after December 1, 2010, operators have been the highest ranking employees at DEMCO at nights and on the weekends. (Hearing Transcript p.276, lines 19-22). Since that date, operators are DEMCO management during normal

work hours in addition to being management on weekends and after hours. May testified that since December 1, 2010, the outage clerk reports directly to the Chief Systems Operator, Conlee, who also performed an evaluation/interview of her. (Hearing Transcript p.50, lines 1-2).

May testified that operators have always been able to prioritize repairs and call employees to restore power. (Hearing Transcript p.323, lines 17-21). They have also been able to move employees between jobs and assign work. The operators can hold field personnel over until the operators decide to release them. (Hearing Transcript p.233, lines 11-17). May testified that the biggest change in the operators' role since December 1, 2010 is that the operators have been granted the authority to perform their duties without seeking higher management approval for non-routine decisions. (Hearing Transcript p.262, lines 3-9). The record establishes that the Systems Operators have authority to resolve customer complaints. (Hearing Transcript p.263, lines 15-25 and p.264, lines 1-4).

May testified that DEMCO started Management and Leadership Development Training classes, and the Systems Operators were expected to and did, in fact, participate. (Hearing Transcript p.214, lines 14-25 and p.215, lines 1-7). These classes are for all DEMCO management personnel. (Hearing Transcript p.214, lines 14-15). A copy of the list of courses that Systems Operators were asked to attend was introduced as Exhibit R-2. (Hearing Transcript p.215, line 7).

Slides from presentations for management training that reflect the topics covered were introduced as Exhibit R-3. (Hearing Transcript p.216, line 13). The sign-in sheets for management training reflected the signatures of operators, Conlee, Sibley, and Landry. (Hearing Transcript p.218, lines 14, 16 and 20). Minutes of a supervisors meeting that was held on December 8, 2010 reflect that the Systems Operators had moved into management positions and that discussions were had with other supervisors to explain what this meant and how to advise the field employees. (Hearing Transcript p.220, line 15). These minutes were introduced as Exhibit R-4. (Hearing Transcript p.220, line 11).

DEMCO's operators and chief operators are clearly "supervisors" as defined by the Act, and, therefore, are not subject to the Act and were lawfully and correctly removed from the bargaining unit. This initial determination is essential for a proper ruling on whether DEMCO altered the unit's scope by removing the positions from the bargaining unit.

C. DEMCO did not violate its duty to bargain because the Union waived its right to bargain over the change in classification.

1. The Union contractually waived its bargaining right in the CBA's Management Rights Clause which gave DEMCO the right to establish and discontinue job classifications.

Pursuant to the collective bargaining agreement in effect at the time of the alleged unfair labor practice, DEMCO had the right to reclassify its employees to better suit its business needs. A waiver of bargaining rights may be contractually

based. *Bancroft-Whitney Co., Inc.*, 214 NLRB 57 (1974); *Radioear Corp.*, 199 NLRB 1161 (1972). No rigid rules can be formulated regarding waivers, and the finding of a waiver will depend upon the circumstances of each case. *Id.* A question of waiver by contractual provision is a matter of contract interpretation. *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). The Board failed to follow the well-established principles of contract interpretation. Furthermore, the Administrative Law Judge and the Board failed to consider all of the surrounding circumstances. *Elec. Workers IBEW Local 1466 v. NLRB,* 795 F.2d 150 (D.C. Cir. 1986).

Pursuant to Article II of the Collective Bargaining Agreement by and between DEMCO and IBEW effective through February 28, 2011, DEMCO retained all management rights including the right to "**establish job classifications, and discontinue job classifications**." (General Counsel Exhibit 3). The language is perfectly clear. Where the language of the contract is clear and unambiguous, courts may not inquire into the intent of the parties to contradict the plain meaning of the contract. *Paper, Allied-Indus. Chem. & Energy Workers Int'l Union, Local 4-12 v. Exxon Mobil Corp.*, 657 F.3d 272, 279 (5th Cir. 2011). DEMCO discontinued the job classifications of Systems Operator and Chief Systems Operator within the bargaining unit and established new management

positions. Importantly, this was not the first time that DEMCO had discontinued a job classification within the bargaining unit and established a management position.

During the hearing, testimony revealed that other employees of DEMCO had been previously removed from the bargaining unit without bargaining or opposition from the Union. John Vranic testified that one switchboard operator position and a number of administrative aid positions were removed from the bargaining unit by DEMCO without any opposition from or bargaining with the Union. (Hearing Transcript p.200, lines 1-2). The receptionist who was removed from the bargaining unit was removed because of the confidential information she handled as part of her employment. (Hearing Transcript p. 204, lines 23-25). Ron May also testified that DEMCO created additional management positions besides the systems operator positions beginning around 2007 through the present. (Hearing Transcript p.207, lines 14-19). May reviewed DEMCO's Exhibit R-1 and discussed the people listed, all but two of whom were moved from the bargaining unit into management positions beginning in 2007. (Hearing Transcript p.208, lines 1-25 and p.209, lines 1-25). These positions were filled with existing employees. (Hearing Transcript p. 212, line 16). He noted that many of the changes were made to keep up with changing technology, such as the Data Analyst

position and the Computer Maintenance Technician. (Hearing Transcript p.210, lines 8-10).

The Board erred by failing to find a contractual waiver in the CBA. (Decision of ALJ, p.8). The waiver was clearly articulated and agreed upon by DEMCO and IBEW. DEMCO, in fact, has previously used this power without bargaining or opposition from the Union. Furthermore, the Board failed to consider the testimonial accounts of the conversations surrounding the negotiation of the Management Rights Clause in the CBA. See *Columbus Elec. Co.*, 270 NLRB 686 (1984), enfd. sub nom. *Electrical Workers IBEW Local 1466 v. NLRB,* 795 F.2d 150 (D.C. Cir. 1986) (clear and unmistakable evidence of the parties' intent to waive a duty to bargain "is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement."). The affected employees, union representatives, and DEMCO's upper level management all testified to having conversations about the change in classification before the change ultimately was implemented. By refusing to apply the well-established principles of contract interpretation and failing to look at the surrounding circumstances, the Court should overrule the Board's decision on the contractual waiver of bargaining.

2. IBEW Union waived its bargaining rights by its own inaction.

Even assuming that the management-rights provision of the CBA did not constitute a clear and unmistakable waiver of the Union's right to be consulted about changing the Systems Operator positions to management positions, IBEW, by its inaction, is estopped from asserting its right to bargain over the issue of the change of non-management Systems Operators and Chief Systems Operators to management positions. (Decision of ALJ, p. 7-8). Once an employer notifies a union of a proposed change in conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining. *Meharry Med. Coll.*, 236 NLRB 1396 (1978). The union's obligation to request bargaining arises upon actual notice even if such notice is received from a source other than directly from the employer. *Hartmann Luggage Co.*, 173 NLRB 1254 (1968). If there is adequate notice to the union of the employer's proposed changes, the burden shifts to the union to pursue the matter, if it wishes to do so. Failure to request bargaining may result in the waiver of the union's bargaining rights. *City Hosp. of East Liverpool, Ohio*, 234 NLRB 58 (1978). The Union in this case, after specific written and verbal notice, failed to request bargaining and cannot now be permitted to allege that DEMCO is in violation of Section 8(a)(5) of the Act.

During the week of November 8, 2010, face-to-face meetings were held between management and the Systems Operators in which the current Systems

Operators (and Union members), Jeremy Blouin, Joe Cofield, Bonalee Conlee, Devin Landry and Levy Sibley, were advised that the classified positions of Systems Operator and Chief Systems Operator were going to be changed to management positions. (Hearing Transcript p.62, lines 13-18). Following these meetings, the Systems Operators were sent letters dated November 17, 2010, that advised them of the organizational restructure and provided them with an updated and expanded job description. (General Counsel Exhibit 7).

John Vranic testified that he met with Floyd Pourciau, the Business Manager for the Union, and Shane Pendarvis, Chief Steward for the Union, on November 18, 2010. (Hearing Transcript p.187, line 2). After they had lunch, Vranic advised them that he wished to review with them the letter, dated November 17, 2010, that was addressed to Pourciau concerning the removal of the Systems Operators and Chief Systems Operators from the bargaining unit. (Hearing Transcript p.187, lines 2-25). Vranic testified that he explained the operational side of the company and the reasons for his decision. *Id.* He provided a copy of the letter with attached job descriptions to Pourciau. *Id.* Importantly, neither Floyd Pourciau nor any other representative of the union ever requested bargaining. DEMCO never indicated that it would not bargain over the proposed change. *Id.* Neither the Union nor any employees filed grievances over the decision to change the positions to management and remove the Operators from the bargaining unit.

On December 1, 2010, DEMCO changed its management structure, and the non-management positions of Systems Operator and Chief Systems Operator were changed to management positions. The job duties and responsibilities of the prior non-management positions were expanded. The existing employees, Blouin, Cofield, Conlee, Landry and Sibley were promoted into these new positions.

The Union failed to diligently exercise any right to bargain, so it cannot now claim a failure to bargain on the part of DEMCO. Having been advised both verbally and in writing of the planned change of non-management positions to management positions, the IBEW had a duty to file a grievance, request bargaining, or file a UL Complaint before the effective date of December 1, 2010. The IBEW did not request bargaining, but instead only threatened an unfair labor practice change. Consequently, the IBEW waived its right to bargain over the change.

After the change was made, the Union still took no action to dispute the change after the existing CBA had expired in February, 2011, and a new CBA had been negotiated. Although IBEW reserved the right to file a UL Complaint during bargaining for the February, 2011, CBA, that right and the right to bargain over the change had already been waived by the IBEW through inaction. In essence, the Union simply skipped the critical step of requesting or demanding to bargain.

In *Kansas Nat'l Educ. Assoc.*, 275 NLRB 638 (1985), the NLRB concluded that the union waived its right to bargain concerning the transfer of an employee to another position that required the employee to be placed in a probationary status. The union had received notice of the transfer from the affected employee, and the union officer told the employee that he did not approve of the condition that he accept probationary status, but did not otherwise protest the transfer. The transfer was effective on October 26 and almost a month later on November 21, the union protested. The NLRB found that the union failed to request bargaining until after the transfer was implemented and it effectively acquiesced in the action. The employer did not violate Section 8(a)(5) and (1) by implementing this transfer.

Similarly, in *City Hosp. of East Liverpool, Ohio*, 234 NLRB 58 (1978), the union's failure to request bargaining for over three weeks after having received notice of the employer's change in a term or condition of employment and after the changes had been implemented by the employer resulted in a waiver of its right to bargain.

In this case, the union never did request bargaining, nor did it file a grievance in accordance with the CBA. The Union simply reserved its rights in February of 2011 and ultimately filed the UL Complaint in March of 2011. DEMCO provided adequate notice to the Union, and the Court should overrule the Board's determinations otherwise.

The Union alleged, and the Administrative Law Judge ruled, that DEMCO's actions leading up to the change in classification of the Systems Operators positions warranted a finding of a *fait accompli*. Although the Board did not address this finding, DEMCO, nevertheless, asserts that such a finding is legally and factually unsupported.

As a general principal, unions are required to act with due diligence to request bargaining, or risk a finding that the union has waived its bargaining right. *Fait accompli* is an exception that excuses a union from this bargaining requirement only if the employer gives insufficient notice or otherwise makes it clear that it has no intention of bargaining about the issue. *Mcgraw-Hill Broad. Co., Inc.,* 355 NLRB No. 213 (September 30, 2010). A *fait accompli* finding requires objective evidence and is a question of fact. *Id.* A union representative's subjective impressions of the employer's intention and the employer's use of positive language in its notice announcing the changes are, in and of itself, insufficient evidence to find a *fait accompli*. *Id.*; *see also Bell Atl. Corp.*, 336 NLRB 1076 (2001).

As described above, DEMCO provided notice both verbally and in writing to the Union and affected employees of the management structure changes before those changes were implemented. (Decision of ALJ, p. 7-8). Once notified, neither the Union nor any employees requested bargaining or filed grievances concerning

the change. **No union representative ever requested or demanded bargaining.** The Administrative Law Judge's determination that the Union was excused from its failure to act with due diligence to request bargaining because DEMCO allegedly presented its decision to change the management structure as a *fait accompli* is unfounded in law and constitutes an abusively broad application of the *fait accompli* doctrine. (Decision of ALJ, p.7-8).

The NLRB has designated adequate advanced notice as the most important factor finding that an employer's announcement of chance was a *fait accompli*. *Knight Protective Serv., Inc. & Local 206, United Gov't Sec. Officers of Am. (Ugsoa)*, 354 NLRB No. 86 (Sept. 30, 2009. The Board has found an employer's actions to be a *fait accompli* where the employer failed to give special notice of the change in advance to the union. *Cibi-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982), *enf.* 722 F.2d 1120 (3rd Cir. 1983) (finding a *fait accompli* where the union's officers became aware of the change merely because they themselves were employees). An employer's actions may also be a *fait accompli* if the notice is provided at a point that is too proximate to implementation of the change. *Id.; see also Knight Protective Serv., Inc. & Local 206, United Gov't Sec. Officers of Am. (Ugsoa)*, 354 NLRB No. 86 (Sept. 30, 2009).

In this matter, DEMCO gave adequate notice to affected employees and to the Union. At least 20 days prior to the change, the employer held meetings

notifying employees of the changes. At least 12 days prior to the change, the employer met with union representatives to further discuss the proposed change. The length of notice was adequate to provide the Union with a meaningful opportunity to request bargaining. *Cf. Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983) (finding of *fait accompli* because union learned of layoffs only fifteen minutes before they were announced); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562 (10th Cir. 1993) (finding of *fait accompli* because employer had implemented unilateral change in policy before union received notice of the change). The employer communicated the changes in face-to-face meetings and by letter. The employer did not act secretly and fulfilled its obligation to inform the Union. *Cf. NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992) (finding of *fait accompli* where employer implemented its plan secretly and failed to inform union until too late to bargain).

The employer's use of positive language in its communications is not a dispositive factor of a *fait accompli*. The law establishes that language of an employer's proposed policy is not required to be phrased in an open-ended manner. *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6th Cir. 1995). Although the Union threatened an unfair labor practice charge, the Union failed to request bargaining on the matter. The Union is obligated to do more than merely protest a change; the Union must meet its obligation to request bargaining. *Id.* (quoting

YHA, Inc. v. NLRB, 2 F.3d 168 (6th Cir. 1993)). Here, the Union's threat of a UL charge constitutes mere protest and does not satisfy the Union's obligation to request bargaining.

Considering that DEMCO had conversations and written communications with the affected employees and the local Union about the changes prior to their implementation and the Union failed to act with due diligence to request bargaining, the union waived its right to bargain. A *fait accompli* does not exist in this case, as DEMCO took precaution to notify the Union and provide a meaningful opportunity to request bargaining. There was an effective waiver of the right to bargain through the Union's inaction.

D. DEMCO's UC Petition was timely and a proper procedural vehicle to determine whether the Systems Operators were supervisors and should not have been disregarded as untimely.

The law does not prescribe a mandatory time frame to file a UC Petition. Although the Board generally declines to clarify bargaining units midway in the term of an existing CBA, NLRB precedent allows exceptions when the interests of stability and equity are better served by entertaining a UC Petition during the term of the CBA. *WNYS-TV (WIXT)*, 239 NLRB 170 (1978); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973).

DEMCO filed a timely UC Petition. On February 7, 2011, DEMCO and the Union entered into an agreement wherein the Union reserved its right to bring an

Unfair Labor Practice Complaint, and DEMCO reserved its rights as well. The Union filed its UL Complaint on March 7, 2011. Once the Union filed a UL Complaint, DEMCO timely answered the UL Complaint and concurrently asserted a UC Petition that should have resolved the issue without further proceedings. It is fundamentally unfair to require DEMCO to file a UC Petition when the Union has failed to request bargaining as set forth above.

In this case, if the Court determines that the Systems Operators were improperly removed from the bargaining unit prior to the expiration of the CBA, then DEMCO filed a UC Petition in a timely fashion. The interests of equity, stability and judicial economy are best served by the Court overruling the Board's decision and requiring the Board to rule on the UC Petition to determine whether the Systems Operator positions are supervisory positions for purposes of the new CBA negotiated in February of 2011.

IV. CONCLUSION

The Systems Operators at DEMCO are supervisors pursuant to Section 2(11) of the NLRA and the authoritative precedent of this Court. Accordingly, DEMCO cannot be required to bargain over their inclusion in the bargaining unit. Furthermore, the Union expressly waived its right to bargain over the issue through the Management Rights Clause of the CBA and through its own inaction after having received prior written and verbal notice of the change. Accordingly, this

Court should overturn the NLRB's decision. Regardless, DEMCO had the right to exclude the Systems Operator positions from the bargaining unit as supervisorsonce the CBA in existence at the time of the change expired. DEMCO used a proper procedural vehicle, the UC Petition, to accomplish the same.

Respectfully submitted,

TAYLOR, PORTER, BROOKS & PHILLIPS L.L.P.

By: /s/ David J. Shelby II

David J. Shelby II, Bar #22614
M. Lenore Feeney, Bar #18597
Chase Tower South
451 Florida Street, 8th Floor (70801)
Post Office Box 2471
Baton Rouge, LA 70821-2471
Telephone: (225) 387-3221
Facsimile: (225) 346-8049

Attorneys for Dixie Electric Membership Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and forgoing motion on behalf of Dixie Electric Membership Corporation, Petitioner-Appellant, was filed in electronic form with the Clerk of Court, United States Court of Appeals with the Fifth Circuit using the CM/ECF system, and was served by United States mail, postage prepaid, on all counsel of record, as follows:

Linda Dreeben
Julie Brock Broido
Michael Randall Hickson
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570

M. Kathleen McKinney, Regional Director,
Beauford D.. Pines, Counsel for the Acting General Counsel,
NLRB Region 15,
600 South mastri place, 7th floor,
New Orleans, LA 70130-3413

Thus done and signed this 21st day of May, 2015.

/s/ David J. Shelby II
David J. Shelby II

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 25.2.1 and 25.2.13, I certify that the required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Pursuant to 5th Cir. R. 32(a)(2)-(7), I further certify that this motion complies with the format and page limit requirements. This Brief contains 9,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ David J. Shelby, II
David J. Shelby, II